Office-Supreme Court, U.S.
FILED
FEB 16 1983
ALEXANDER L. STEVAS,
CLERK

82-1377

No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1982

VICTOR I. McKAY,

Petitioner,

v.

THE UNITED STATES,

Respondent.

# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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## QUESTIONS PRESENTED

1. Does the failure of a Federal Agency to state the reasons for an employee's dismissal, in violation of the Agency's published procedures, nullify the dismissal?

2. Does the First Amendment prohibit the Federal Government from dismissing a competent, non-civil service, non-policymaking, non-confidential employee because he is not supported by the incoming administration?

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1983

Victor I. McKay,

Petitioner,

v.

The United States,

Respondent.

# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioner respectfully requests that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Federal Circuit entered in this proceeding on November 18, 1982.

## OPINIONS BELOW

The opinion of the Court of Appeals has not been reported and is reproduced as Appendix B, App. 37a. The opinion of the United States Claims Court has not been reported and is reproduced as Appendix A, App. 1a.

## JURISDICTION

This petition for a writ of certiorari was filed within 90 days of the date that the Court of Appeals issued its decision. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

### FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

Congress shall make no law . . . abridging the freedom of speech or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

## STATEMENT OF THE CASE

Petitioner Victor McKay was given an Administratively Determined (AD) position at the Agency for International Development (AID) because of his contacts with the Nixon Administration. App. 32a. After President Carter took office, AID reviewed all AD appointments and removed petitioner along with other holdovers from the prior administration. App. 35a.

Petitioner was a valued employee at AID, where he was praised for developing a new visa form and for his work on two handbooks. App. 33a. However, he did not perform any managerial or policymaking responsibilities. App. 9a.

AID regulations require that AD appointees be given a written statement of reasons when they are dismissed. App. 23a, 32a. The Claims Court found that AID failed to state any reason for petitioner's

termination, but ruled that this violation of AID regulations was "non prejudicial." App. 24a, 27a.

Petitioner contends that his termination, because he failed to obtain a sponsor in the Democratic administration, was contrary to the First Amendment and contrary to this Court's decision in Elrod v. Burns, 427 U.S. 347 (1976).

Petitioner contends that AID's violation of its regulations nullifies his termination and that his reinstatement is mandated by this Court's decision in Vitarelli v. Seaton, 359 U.S. 535 (1959).

## REASONS FOR GRANTING THE WRIT

### I. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE DECISION OF THE SUPREME COURT IN VITARELLI v. SEATON, 359 U.S. 535 (1959).

The Court of Appeals ruled that the procedural violations found by the trial

court were not prejudicial to petitioner. The trial court found that AID did not provide petitioner with the reasons for his dismissal. App. 24a, 27a.

This court, in Vitarelli v. Seaton, 359 U.S. 535, found the identical procedural violation to require reinstatement with back pay. Both Mr. Vitarelli and petitioner were terminable at will, and it could be argued that both dismissals, although in violation of law, were "non-prejudicial."

This court ruled in Vitarelli v. Seaton that the Secretary of the agency "was bound by the regulations which he himself had promulgated for dealing with such cases, even though without such regulations he could have discharged petitioner summarily." 359 U.S. at 540.

As in the instant case, the procedural

safeguard in Vitarelli v. Seaton, supra, required that the notification of termination specify the reasons, in detail, for the termination. Because detailed reasons were not specified this court ruled that the termination was unlawful and that the employee be reinstated.

In his separate opinion in Vitarelli Mr. Justice Frankfurter stated:

> An executive agency must be rigorously held to the standards by which it professes its action to be judged. [citation omitted] Accordingly, if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed. 359 U.S. at 546, 547.

## II. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE DECISION OF THE SUPREME COURT IN ELROD v. BURNS, 427 U.S. 347 (1976).

This court has not yet ruled on the applicability of Elrod v. Burns, 427 U.S. 347 (1976), to federal employees. This case presents important questions of Constitutional law which should be decided by this court.

The trial court found that petitioner was removed from AID to make room for patronage appointments. App. 35a. The Court of Appeals affirmed. App. 37a. The Supreme Court in Elrod v. Burns, supra, held that such a removal is unconstitutional:

> it is not clear that dismissal in order to make room for a a patronage appointment will result in replacement by a person more qualified to do

the job . . . .

427 U.S. at 364, 365.

The court below specifically found that petitioner was a valued employee, and that he was neither a policymaking nor managerial employee. App. 9a, 13a.

The ruling of the lower court undermines the decision of this court in Elrod v. Burns, supra. While Elrod held that political dismissals were proper for confidential or policymaking employees, the court below allowed a dismissal of a non-policymaker to make room for a policymaking employee. The decision nullifies Elrod by undercutting the very employees it was designed to protect.

## III. CONCLUSION.

Because this case involves important questions of Federal Constitutional law,

and because the rights of millions of government employees are affected by possible patronage removals and by removals in violation of published regulations, certiorari should be granted to review the decision of the Court of Appeals.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

TRIAL DIVISION

No. 340-80c

(Filed April 26, 1982)

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VICTOR I. McKAY ) Civilian pay; administratively determined employees; probationary employees; burden of proof; political beliefs; communication with Congress; alleged procedural errors.

THE UNITED STATES )

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Joel D. Joseph, attorney of record, for plaintiff.

Thomas W. B. Porter, with whom was Assistant Attorney General J. Paul McGrath, for defendant. Ronald Russell, Office of General Counsel, Agency for International Development, and Mark Anderson, Office of Regional Counsel, Department of the Interior, of counsel

OPINION*

WHITE, Senior Trial Judge: Victor I. McKay (plaintiff) sues because of the alledgedly wrongful termination in June 1977 of his employment in the Agency for International Development (AID), Department of State, and the allegedly wrongful termination in December 1978 of his employment in the Fish and Wildlife Service (FWS), Department of the Interior.

The petition alleges that the plaintiff's employment in AID was terminated "because of the beliefs that he held, and for the statements that he made to his superiors at AID and to Members of Congress and staff of committees and

*The trial judge's recommended decision and conclusion of law are submitted in accordance with Rule 134(h).

Members of Congress."

The petition also alleges that the plaintiff's employment in FWS was terminated "because of his beliefs and because he communicated with Members of Congress."

The plaintiff had the burden at the trial of proving these allegations concerning the reasons why the respective agencies terminated his employment, because, in the absence of such proof, the actions of the administrative officials in terminating the plaintiff's employment are supported by a presumption of regularity (United States v. Chemical Foundation, 272 U.S. 1, 14-15 (1926)) and good faith (Wathen v. United States, 208 Ct. Cl. 342, 354, 527 F. 2d 1191, 1198 (1975)). Strong proof was required to rebut the presumption. Hirsch v. United States,

205 Ct. Cl. 256, 260, 499 F. 2d 1248, 1250 (1974). As explained later in the opinion, the plaintiff failed to discharge the burden of proof imposed on him.

AID Employment and Termination

The allegation that one of the reasons for the termination of the plaintiff's employment in AID was "because of the beliefs that he held" apparently relates to the plaintiff's political beliefs.

In this connection, the evidence shows that the plaintiff was employed by the Inaugural Committee in connection with the inauguration of President Nixon; that, on the basis of the plaintiff's contacts with White House personnel during the Nixon Administration, the plaintiff secured his appointment in AID effective October 28, 1973; and that the plaintiff's

employment with AID was terminated effective June 3, 1977, during the Carter administration.

The plaintiff and some other AID personnel surmised that the plaintiff's previous connection with the Nixon administration was one of the reasons why his employment in AID was terminated. However, the preponderance of the evidence shows conclusively that the plaintiff's political affiliation and beliefs were unknown to the AID officials involved in the decision to terminate the plaintiff's employment and did not play any part in such decision. Thus, the cases relied on by the plaintiff as holding that public employees cannot be removed because of political affiliation (e.g., Elrod v. Burns, 427 U.S. 347 (1976); Branti v. Finkel, 445 U.S. 507 (1980)) do not have any application to the facts of this case.

The allegation that the second reason for the termination of the plaintiff's employment in AID was "because of *** statements that he made to his superiors at AID and to Members of Congress and staff of committees and Members of Congress" apparently related to the so-called "brain drain" or "no go" problem which the plaintiff encountered in the course of his work as an AID employee.

As an employee of AID, with the title of "Social Welfare Specialist," the plaintiff was assigned to work in the Participant Relations Branch, Training Support Division, Office of International Training (OIT). The plaintiff's duties about returning to their native countries, attempting to locate students who failed to return, and serving as liason with the Immigration and Naturalization Service

in attempting to ensure the student's return.

The plaintiff believed that AID was underestimating -- and was furnishing incorrect data in reports to Congress concerning -- the number of AID-sponsored foreign students who failed to return to their native countries. He made repeated attempts to persuade his superiors in AID that the under-reporting (in his opinion) to Congress on the extent of the so-called "brain drain" or "no go" problem was significant. However, the plaintiff was unsuccessful in his efforts to convince superiors in AID that the inaccurate (according to his view) information furnished to Congress about the "brain drain" problem should be corrected.

Impelled by what he believed to be the seriousness of the "brain drain" problem,

the plaintiff individually communicated with congressional staff personnel concerning the problem. Such contacts became known among colleagues and superiors of the plaintiff in OIT, and, as a result, the plaintiff was regarded by some superiors in OIT as a "nuisance" and as an "embarrassment." However, none of the plaintiff's superiors in OIT recommended, or otherwise attempted to secure, the termination of the plaintiff's employment because of his congressional contacts; and the preponderance of the evidence shows that such contacts did not have any bearing on the decision in AID to terminate the plaintiff's appointment. For that reason, the court decisions upholding the First Amendment rights of government employees to freedom of expression (e.g., Swaaley v. United States, 180 Ct. Cl. 1, 376 F. 2d 857 (1976

Jackson v. United States, 192 Ct. Cl. 765, 428 F. 2d 844 (1970)) are inapposite.

As previously indicated, the preponderance of the evidence in the record shows that neither the plaintiff's political beliefs nor his activities in connection with the "brain drain" problem were responsible in any way for the termination of the plaintiff's employment in AID. The real reason for such termination will be outlined in succeeding paragraphs of this opinion.

The plaintiff occupied an "administratively determined" (AD) position in AID at the AD-12 level, which was equivalent in salary and responsibility to a GS-12 civil service position. The plaintiff did not perform any managerial or policy-making responsibilities at AID.

The statutory authority for AD

appointments in AID is 22 U.S.C. §2385(b), which provides in part that "not to exceed one hundred and ten [employees] may be appointed, compensated, or removed [by AID] without regard to the provisions of any law, of whom not to exceed fifty-one may be compensated at rates higher than those provided for grade 15 of the general schedule ***."

The plaintiff knew from the beginning of his employment at AID that he held an AD position, that this position was not covered by civil service or foreign service protection, that he served in the AD position at the pleasure of the Administrator of AID, and that, in the event of a termination of his AD appointment, he did not have any reemployment rights in the government service.

During the period from April 1977 to

January 1980, the principal Special Assistant to the Administrator of AID was Lavern W. Newton (Mr. Newton). The Administrator delegated to Mr. Newton (among other functions) authority over the appointment and removal of AD personnel.

In 1977, Mr. Newton conducted a review of all existing AD appointments within AID. The purpose of the review was to assure the best possible use, for policymaking and management, of the 110 AD positions authorized by Congress. The plaintiff's AD position was included in this review.

It was Mr. Newton's view that AD appointments should be made only to critical policymaking and managerial positions, and that any AD appointments previously made to positions of relatively minor importance should be terminated, so as to make this

appointing authority available for use by the Administrator of AID as a management tool.

In conducting his review of AD positions, Mr. Newton noted that the plaintiff held an AD appointment in OIT and was at a very low level in OIT's chain of command. This fact led Mr. Newton to conclude that the plaintiff was not performing any critical managerial or policymaking functions and that the plaintiff's AD appointment was a misallocation of the valuable AD appointing authority. On the basis of this conclusion, Mr. Newton decided that the plaintiff's AD appointment should be terminated.

Mr. Newton's decision that the plaintiff's AD appointment should be terminated was effectuated by means of a letter dated May 5, 1977, to the plaintiff

from AID's Office of Personnel and Manpower. This letter stated in part as follows:

> This letter is to notify you of the Administrator's decision to terminate your services as Social Welfare Specialist, AD-0101-12. This action is to be effective at the close of business, June 3, 1977.
>
> * * * * *
>
> This action should not be construed in any way as a reflection on your personally.

The plaintiff was one of a number of AD appointees in AID whose appointments were terminated as a result of Mr. Newton's review.

In conducting his review of AD appointments and making the related termination decisions, Mr. Newton did not have any information regarding the political parties or affiliations of the employees holding AD appointments.

When he made the decision to terminate the plaintiff's AD appointment, Mr. Newton did not have any knowledge concerning the plaintiff's political party or affiliation. Furthermore, Mr. Newton did not have any knowledge concerning the plaintiff's views on the "brain drain" problem, or concerning the plaintiff's criticisms of AID in connection with this problem, or concerning the plaintiff's communications with congressional personnel relative to this problem. The decision to terminate the plaintiff's AD appointment was not based to any extent on any of these factors.

Thus, it is clear from the evidence that the plaintiff's Ad appointment in AID was not terminated because of his political beliefs or affiliation, or because of the statements that he made to his superiors in AID or to congressional personnel concerning

the "brain drain" problem, as alleged in the petition.

FWS Employment and Termination

The Department of the Interior was responsible for the administration of the Young Adult Conservation Camp (YACC) program; and the Fish and Wildlife Service (FWS) of the Interior Department was involved in the administration of the program. This was a work program intended to provide employment for young adults in connection with conservation work on public lands.

The plaintiff was given a 1-year probationary appointment in FWS effective January 8, 1978, and was assigned to the position of Center Director, YACC Center, Mark Twain National Wildlife Refuge. The plaintiff was stationed in Quincy, Illinois.

The plaintiff's immediate supervisor was Kermit Dybsetter (Mr. Dybsetter),

Regional Coordinator for the YACC program in Region 3 of FWS. Mr. Dybsetter was stationed in Minneapolis, Minnesota.

The plaintiff's duties as Center director included carrying out the YACC program within the framework of applicable laws and guidelines, and providing leadership and supervision for all personnel (group leaders and YACC enrollees) at the Center.

There is nothing in the record to indicate that Mr. Dybsetter, or any other official of FWS or the Interior Department, was aware at any time during the plaintiff's employment in FWS of the plaintiff's political beliefs or affiliation. Consequently, the allegation in the petition that one of the reasons for the termination of the plaintiff's employment in FWS was his "beliefs" is wholly lacking in evidentiary support.

The allegation that the second reason for the termination of the plaintiff's employment in FWS was "because he communicated with Members of Congress" seems to be based on the circusmtance that the plaintiff, during his employment with FWS, continued to communicate with congressional personnel concerning the "brain drain" problem, to which he had devoted much time and attention while employed in AID. The plaintiff thought that possibly he had failed to emphasize the seriousness of the "brain drain" problem sufficiently while employed in AID, and he felt that he had a continuing obligation to attempt to arouse congressional interest in the problem. In pursuing the matter, the plaintiff visited the local office of the Congressman representing the district in which Quincy is situated, he visited the Springfield office of Senator

Percy of Illinois, and he also communicated in writing with congressional personnel.

On one occasion when Mr. Dybsetter visited the plaintiff in Quincy, the plaintiff showed Mr. Dybsetter a file of correspondence with congressional personnel concerning the "brain drain" problem. Mr. Dybsetter, upon examining this correspondence, threw it down on a table and remarked, "You are a man of causes."

Although Mr. Dybsetter's reaction might be construed as indicating some irritation that the plaintiff was devoting time and attention to governmental matters unrelated to his official duties with FWS, the evidence concerning this incident certainly would not support a finding that the plaintiff's employment in FWS was terminated because of his action in continuing to communicate with congressional personnel concerning the "brain

drain" problem.

Actually, the evidence in the record makes it plain that the plaintiff's probationary 1-year appointment in FWS was terminated because Mr. Dybsetter concluded that the plaintiff was seriously deficient as Center Director in supervising and directing his staff and the young people enrolled in the YACC program.

The findings of fact outline some of the incidents that led to Mr. Dybsetter's dissatisfaction with the plaintiff's performance of his duties, and the findings also include explanations by the plaintiff concerning such incidents. The details need not be repeated here, as it is sufficient to say that the incidents involved actions by the plaintiff in countermanding a decision by one of his group leaders to suspend some female YACC enrollees who engaged in a sit-

down strike, in disobeying Mr. Dybsetter's instructions that YACC funds and personnel should not be used in making improvements on a privately owned cabin, in failing to maintain what Mr. Dybsetter regarded as a proper level of communication with YACC group leaders and with officials of the Mark Twain National Wildlife Refuge, in failing to follow Mr. Dybsetter's advice that one of the plaintiff's group leaders was inefficient and should be replaced, and in using YACC funds and personnel (contrary to instructions) on work projects that had not been approved by the Regional Office.

Because of what Mr. Dybsetter regarded as the plaintiff's unsatisfactory performance as Center Director, Mr. Dybsetter decided to terminate the plaintiff's 1-year probationary employment in FWS. Accordingly, under the date of December 11, 1978, Mr. Dybsetter

addressed a letter to the plaintiff, stating that the plaintiff's employment with FWS would be terminated effective December 29, 1978, and that the reason for the termination was the plaintiff's unsatisfactory performance of his duties as Center Director. The letter then proceeded to outline in considerable detail the various factors which led Mr. Dybsetter to conclude that the plaintiff's performance as Center Director was unsatisfactory.

It is not necessary for the court to decide whether the plaintiff was or was not an effective Center Director, or whether Mr. Dybsetter's conclusion regarding the plaintiff's serious deficiencies as Center Director was or was not sound. It is sufficient for the purposes of the present litigation that Mr. Dybsetter believed that plaintiff to be seriously deficient as

Center Director, and that his belief on Mr. Dybsetter's part was the reason -- and the only reason -- for the termination of the plaintiff's probationary 1-year appointment in FWS.

The evidence in the record does not sustain the allegation in the petition that the plaintiff's 1-year probationary employment in FWS was terminated because of his political beliefs or because of his communications with congressional personnel. Hence, the court cases protecting government employees from dismissal because of political affiliation or the exercise of the right of freedom of expression are not pertinent to this aspect of the case.

Alleged Procedural Errors

The plaintiff's post-trial brief contends that both the termination of his employment in AID and the termination of his employ-

ment in FWS were procedurally defective because the respective agencies failed to follow prescribed personnel regulations.

It should be noted, in the first instance, that neither the plaintiff's petition nor his pretrial submission pursuant to the Standard Pretrial Order on Liability raised any question concerning the procedural regularity of the respective terminations. The issue was raised at the trial, however, and counsel for both parties alluded to it in a discussion on the record at the conclusion of the trial. Consequently, it will be disposed of under Rule 39(b).

With respect to the termination of the plaintiff's employment in AID, the plaintiff relies on a personnel regulation in AID Handbook 25. Section 12(H) of that handbook, which dealt with the "Separation of an Administratively Determined (AD) Employee,"

provided in part that a letter notifying an employee that his or her appointment would be terminated should contain (among other things), "The reason(s) for the action in sufficient detail as to be clearly understood by the employee ***." The letter of May 5, 1977, notifying the plaintiff that his services as an employee of AID would be terminated as of the close of business on June 3, 1977, did not state any reason for the termination, although it did state that "This action should not be construed in any way as a reflection on you personally."

The evidence shows that, promptly after receiving the letter of May 5, 1977, the plaintiff went to see a Special Assistant to the Administrator of AID and, in effect, asked for an extension of his employment beyond the termination date. The official (presumably after consulting higher authority in AID) later advised the plaintiff that

the services which he had been performing were no longer regarded as necessary. This statement was factually correct, in that AID at the time was reducing its personnel, and the agency never appointed anyone to perform the services which he had performed during his tenure. However, as indicated earlier in the opinion, the statement did not reflect the actual reason for the termination of the plaintiff's AD appointment.

As a practical matter, the failure to give the plaintiff, either in writing or orally, the real reason for terminating his AD appointment did not adversely affect any substantial rights of the plaintiff. Even if the plaintiff had been told the true reason -- i.e., that his AD appointment was being terminated so that this appointing authority would be available for use by the Administrator in making an appointment to an important policymaking or managerial position -- there would have been no legal basis on

which the plaintiff could have attempted to overturn the decision. As an AD appointee, the plaintiff served at the pleasure of the Administrator, and his AD appointment could be terminated at any time and for any reason that seemed sufficient to the Administrator. Cf. Sims v. Fox, 505 F.2d 857, 861 (5th Cir. 1974), cert denied, 421 U.S. 1011 (1975). Certainly, a determination on the part of the Administrator (or his delegate) that the AD appointing authority, with its freedom from ordinary governmental regulations, should be used only for making appointments to important policymaking and managerial positions must be recognized as being within the broad range of permissible administrative discretion.

Thus, although the failure of AID to inform the plaintiff of the real reason for the termination of his AD appointment was inconsistent with the agency's own personnel regulations, the error did not adversely affect any substantial

rights of the plaintiff. For such a non-prejudicial error, the court would not be justified in awarding damages to the plaintiff and ordering his restoration to duty in AID, as requested in the petition. Pascal v. United States, 211 Ct. Cl. 183, 189, 543 F.2d 1284, 1288 (1976).

Turning now to the alleged procedural error in connection with the termination of the plaintiff's 1-year probationary employment in FWS, the plaintiff relies on the failure of his supervisor, Mr. Dybsetter, to comply with the following portion of paragraph (5) of subsection "a" of section 8-3 of the Federal Personnel Manual (the title of section 8-3 being "Evaluation of Probationer by Supervisor"):

> (5) The supervisor of each employee serving a probationany period must, no earlier that the beginning of the 9th month nor later that the end of the 10th month of the period, submit through supervisory channels a signed statement certifying either that the employee's performance, conduct, and

> general traits of character have been found satisfactory or that they have been found unsatisfactory. Each certification must contain a positive recommendation whether the employee should be retained beyond the probationary period. This requirement must be observed regardless of whether one or more performance ratings may be prepared and submitted during the probationary period.***

The evidence shows that, as to the plaintiff, Mr. Dybsetter did not submit to higher authority, through supervisory channels, the written statement required by paragraph (5), certifying the nature of the plaintiff's performance, conduct and general traits of character, and making a positive recommendation on the plaintiff's retention of release. The plaintiff, however, has no basis on which to complain about the omission, because the quoted provision was not promulgated for the benefit of probationary employees. Cf. Krukar v. Alexander, 386 F. Supp. 1112, 1116 (N.D. Ill. 1974). For example, the provision does not contain any requirement that

a probationary employee be given a copy of the evaluation report, certification, and recommendation prepared by his supervisor. Obviously, then purpose of the quoted provision is to make sure that the responsible officials in the chain of command above the supervisor are adequately informed, in a timely fashion before the end of the probationary period, concerning the performance, conduct, and general traits of character of a probationary employee, and advised as to whether such employee should be retained beyond the probationary period or released at or before the termination of the period.

Actually, paragraph (5), at the end of the material previously quoated, contains an additional sentence which specifically states that "No portion of this paragraph is to be interpreted as preventing or discouraging the initiation of removal in accordance with

paragraph (4) above, at any time during the probationary period." Paragraph (4) provides as follows:

> (4) If it becomes apparent, after full and fair trial, that the employee's conduct, general character traits, or capacity do not fit him or her for satisfactory service, the supervisor must initiate action to separate the employee. This kind of action should be taken as soon as these facts become apparent, and should, in any event, be taken in sufficient time for the employee to be notified, prior to the expiration of the probationary period, that he or she will not be retained.

It is clear, therefore, that the failure of the plaintiff's supervisor to prepare the written statement, certification, and recommendation prescribed by paragraph (5) did not have any effect on the authority of FWS to terminate the plaintiff's probationary employment as soon as a bona fide determination was made that the plaintiff's performance of his duties was unsatisfactory.

To summarize: the procedural errors complained of by the plaintiff do not provide any basis for invalidating the administrative actions in terminating the plaintiff's AD appointment in AID or his 1-year probationary employment in FWS.

Conclusion

For the reasons previously stated, it is my opinion that the plaintiff is not entitled to recover. Accordingly, the petition should be dismissed.

[PORTIONS OF] FINDINGS OF FACT

1. (a) Victor McKay (plaintiff) was employed by the Inaugural Committee in connection with the inauguration of President Nixon.

(b) Later, on the basis of his contacts with White House personnel during the Nixon Administration, the plaintiff secured an appointment in the Agency for International Development (AID) as counselor for foreign students with the title of "Social Welfare Specialist."

7. (a) The plaintiff's appointment at AID was to any "administrative determined" (AD) position.

10. The AID personnel regulations concerning AD employee were contained in AID handbook 25. The matter of separating an AD employee was covered by paragraph 12H, which provides in part as follows:

12 H Separation of an Administratively Determined (AD) Employee

1. A person appointed to an Administratively Determined (AD) position serves at the discretion of the Administrator and may be terminated any time his/her services, for any reason, are no longer needed.

* * *

2. Procedures.

* * * * *

b. SER/PM prepares the letter notifying the employee that the AD appointment will be terminated. The letter contains the following information:

(1) The reason(s) for the action in sufficient detail as to be clearly understood by the employee;

(2) The date the AD appoitment will be terminated;

(3) Information concerning entitlement to serverance pay; and

(4) Information concerning reinstatement rights, if any.

12. Except as indicated in finding 13, the plaintiff was valued as an employee of AID. For example, he was praised for developing a new visa form and for his work on two handbooks, one for participants and

one for training officers.

13. (a) The plaintiff believed that AID was underestimating -- and was furnishing incorrect date in reports to Congress concerning the number of AID-sponsored foreign students who failed to return to their native countries. He made repeated attempts to pursuade his superiors in AID that his perceived under-reporting of the so-called "brain drain" or "no go" problem was significant.

(b) The plaintiff was unsuccessful in his efforts to convince superiors in AID that the inaccurate (according to his view) information furnished to Congress about the "brain drain" problem should be corrected.

(c) Impelled by what he believed to be the seriousness of the problem, the plaintiff then communicated with congressional staff members concerning the "brain drain"

problem. Such contacts became known among his colleagues and superiors of the plaintiff in OIT; and, as a result, the plaintiff was regarded by some superiors in OIT [Office of International Training] as a "nuisance" and as an "embarrassment." However, none of the plaintiff's superiors in OIT recommended, or otherwise attempted to secure, the termination of his employment because of such contacts, although the plaintiff was advised by at least one colleague to cease his agitation of the "brain drain" problem lest it adversely affect his employment in AID and his ability to support his family.

15. (a) In 1977, Mr. Newton, in carrying out the responsibilities assigned to him by the Administrator of AID, conducted a review of all existing AD appointments within AID. The purpose of the review was to assure the best possible use, for policymaking and management, of the 110 AD positions authorized by Congress. The plaintiff's AD position was included in this review.

(b) It was Mr. Newton's view that AD appointments should be made only to critical policymaking and managerial positions, and that any AD appointments previously made to positions of relatively minor importance should be terminated, so as to make this appointing authority available for use by the Administrator as a management tool.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

| | | |
|---|---|---|
| VICTOR I. McKAY, Appellant, | ) | |
| v. | ) | Appeal No. 340-80C |
| THE UNITED STATES, Appellee. | ) | |

Decided: November 18, 1982

Before MARKEY, Chief Judge, FRIEDMAN, and KASHIWA, Circuit Judges.

PER CURIAM.

DECISION

The judgment* of the United States Claims Court dismissing McKay's petition is affirmed.

*Pursuant to order of this court dated October 4, 1982, the United States Claims Court entered a judgment on October 8, 1982 corresponding to the decision rendered in this case.

OPINION

The record contains substantial evidence supporting the findings on which rested the dismissal of the petition. Nothing of record requires a crediting of McKay's assumptions that terminations of his employment resulted from his political affiliations and beliefs or from his having petitioned the government. Similarly, the record fully supports the finding that any procedural errors were technical and harmless.

McKay's reliance on an excerpt from Exhibit 41, and on the statutory delegation of power to terminate, is misplaced. The former does not conflict with finding 18. The latter undergirds the power administratively delegated to Mr. Newton.

Office-Supreme Court, U.S.
FILED
MAY 17 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1377

# In the Supreme Court of the United States

OCTOBER TERM, 1982

VICTOR I. MCKAY, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

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Petitioner contends that the termination of his federal employment violated the First Amendment and applicable agency regulations.

1. Petitioner was employed by the Inaugural Committee in connection with the inauguration of President Nixon (Pet.App. 4a, 32a). On the basis of his contacts with Nixon administration White House personnel, petitioner was appointed in 1973 as counselor for foreign students in the Agency for International Development (AID) and was given the title of "Social Welfare Specialist" (*id.* at 4a, 32a). He occupied what is termed an "administratively determined" (AD) position (*id.* at 9a, 32a). AD positions at AID are authorized by 22 U.S.C. 2385(b), which provides in part that "not to exceed one hundred and ten [employees] may

be appointed, compensated, or removed [by AID] without regard to the provisions of any law * * *" (Pet. App. 10a). From the outset of his employment, petitioner was aware that his position was an AD position, that he served at the pleasure of the AID Administrator, that he was not covered by any civil service protection, and that, if terminated from his AD appointment, he had no reemployment rights in the government service (*ibid.*).

In 1977, Lavern W. Newton, who was the principal Special Assistant to the Administrator of AID and had authority over the appointment and removal of AD personnel, conducted a review of the agency's AD positions in order to determine their best possible use (Pet. App. 11a, 35a). Newton's view was that AD appointments should be used only for important policymaking and managerial positions and that AD appointments to positions of comparatively minor importance should therefore be terminated (*id.* at 11a-12a, 36a). During his review, Newton noted that petitioner held a low-level position in the chain of command and was not performing critical policymaking or managerial functions. Newton consequently concluded that petitioner's AD appointment should be terminated because it was a misallocation of the valuable AD appointing authority (*id.* at 12a).

Petitioner was notified of the termination of his AD appointment by letter dated May 5, 1977. This letter did not explain the reason for petitioner's termination but stated that "[t]his action should not be construed in any way as a reflection on you personally" (Pet. App. 13a, 24a). Section 12H of AID Handbook 25 (Jan. 30, 1975), which dealt with the "Separation of an Administratively Determined (AD) Employee," provided in part that when notification of termination was sent to an AD employee, it should contain,

*inter alia*, "[t]he reasons for the action in sufficient detail as to be clearly understood by the employee * * *" (Pet App. 23a-24a).[1]

Petitioner filed suit in the Court of Claims, alleging, among other things, that his employment at AID was terminated because of his political beliefs. The trial judge held that the preponderance of the evidence showed conclusively that petitioner's political affiliation and beliefs were not known to the AID officials who decided to terminate his employment and did not play any part in that decision (Pet. App. 5a). The trial judge also held that, although AID failed to follow its personnel regulation by not informing petitioner of the reasons for his termination, this failure did not adversely affect any of petitioner's substantial rights. Since

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[1]Paragraph 12H also provided as follows (Pet. App. 33a):

> 12H *Separation of an Administratively Determined (AD) Employee*
>
> 1. A person appointed to an Administratively Determined (AD) position serves at the discretion of the Administrator and may be terminated any time his/her services, for any reason, are no longer needed.
>
> • • • • •
>
> 2. *Procedures*
>
> • • • • •
>
> b. SER/PM prepares the letter notifying the employee that the AD appointment will be terminated. The letter contains the following information:
>
> (1) The reason(s) for the action in sufficient detail as to be clearly understood by the employee;
>
> (2) The date the AD appointment will be terminated;
>
> (3) Information concerning entitlement to severance pay; and
>
> (4) Information concerning reinstatement rights, if any.

that error was not prejudicial, the court refused to award damages or to order petitioner's reinstatement (*id.* at 25a-27a).

The court of appeals affirmed, holding that substantial evidence supported the findings of the trial judge that petitioner was not dismissed for his political beliefs or affiliation and that the agency's procedural errors were technical and harmless (Pet. App. 38a).

2.a. Petitioner first argues (Pet. 4-6) that the court of appeals' decision conflicts with *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959), insofar as the court of appeals held that AID's procedural violations were harmless. This argument lacks merit. In *Vitarelli*, a federal employee was notified that he was being terminated as an employee of the Department of the Interior for national security reasons. Although the Department could have summarily dismissed Vitarelli without giving any reason, the Department chose to dismiss him on the ground that he was a security risk, and Department regulations provided significant procedural protections for employees dismissed on that basis. These safeguards, which were instituted because of the seriousness of the allegation of being a security risk, included the right to a specific and detailed statement of charges against the employee, the right to a hearing before a security hearing board, and the right to cross-examine the government's witnesses. This Court held that the agency's failure to follow these regulations required nullification of the Secretary's decision to dismiss the employee on national security grounds. Vitarelli was thus ordered reinstated subject to any lawful exercise of the Secretary's authority to dismiss him from employment.

The decision below does not conflict with *Vitarelli* because none of petitioner's substantial rights was affected by AID's failure to specify the reason for his dismissal. Even if such notice had been given, there would have been no

legal basis upon which petitioner could have endeavored to avoid dismissal. Since he held an AD position, he served at the pleasure of the AID Administrator; he could be terminated at any time and for any reason that the Administrator deemed appropriate; and he had no right to a hearing or to appeal (Pet. App. 25a-27a). In short, the agency's personnel rules did not grant petitioner any significant procedural protections or safeguards, and therefore AID's failure to follow its own rules was a technical and harmless error (*id.* at 27a, 38a).[2]

Petitioner contends (Pet. 5) that *Vitarelli* is nevertheless applicable because Vitarelli was also terminable at will. However, petitioner overlooks the fact that although Vitarelli was terminable at will for reasons other than national security, the Department chose to dismiss him on national security grounds and was accordingly obligated to give him the substantial procedural safeguards applicable in such cases. Here, AID did not dismiss petitioner on grounds that guaranteed him significant procedural rights.

b. Petitioner next contends (Pet. 7-8) that the court of appeals' decision conflicts with *Elrod* v. *Burns*, 427 U.S. 347 (1976). Under that decision, a former public employee who claims to have been wrongfully dismissed must prove that he was discharged because he was not "affiliated with or sponsored by" a particular political party. *Branti* v. *Finkel*, 445 U.S. 507, 517 (1980). In this case, both lower courts found that petitioner failed to make such a showing. The trial judge held that the evidence conclusively established that petitioner's political affiliation and beliefs were

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[2]In any event, although petitioner was not told the reasons for his discharge when he received notice of termination, he has since been informed of those reasons. Because AID's reasons for discharging AD personnel are not subject to challenge, no purpose would be served by ordering petitioner's reinstatement at this time.

not known to the AID officials who decided to terminate his employment and did not play any part in that decision (Pet. App. 5a). The court of appeals affirmed, holding that there was substantial evidence to support the trial judge's finding that petitioner's termination did not result from his political affiliation or beliefs (*id.* at 38a). This Court ordinarily declines, absent the most exceptional circumstances, to review factual determinations in which the trial court and the court of appeals have concurred. *Branti* v. *Finkel, supra,* 445 U.S. at 512 n.6. There is no reason to depart from that practice here.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
*Solicitor General*

MAY 1983

DOJ-1983-05